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U.S. Citizenship
and Immigration
Services

B6

FILE: WAC-03-040-50534 Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a jewelry designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 4, 2000. The proffered wage as stated on the Form ETA 750 is \$18.75 per hour, which amounts to \$39,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 1998.

On the petition, the petitioner claimed to have been established on April 18, 1995 and to currently employ 50 workers. In support of the petition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Returns for 2001 and 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 28, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner specifically requested completed and signed federal tax returns or audited financial statements from the years 2000 to present.

In response, the petitioner submitted its Forms 1120 Corporate tax returns for the years 2000 through 2002. The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Net income ¹	\$29,054	-\$124,741	-\$14,195
Current Assets	\$408,625	\$144,769	\$360,970
Current Liabilities	\$229,826	\$452,975	\$405,311
Net current assets	\$178,799	-\$308,206	-\$44,341

In addition, counsel submitted copies of Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2000, 2001, and 2002. The Form W-2 Wage and Tax Statement for the year 2000 reflects wages of only \$13,354.72, \$25,645.28 less than the proffered wage. The Form W-2 Wage and Tax Statement for the year 2001 reflects wages of only \$27,276.89, \$11,723.11 less than the proffered wage. The Form W-2 Wage and Tax Statement for the year 2002 reflects wages of only \$22,094.36, \$16,905.64 less than the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 29, 2003, the director again requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner specifically requested *completed and signed* federal tax returns from the years 2000 to present.

In response to the director's request for evidence, the petitioner provided signed and completed tax returns.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 17, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's losses in 2001 and 2002 should be offset by tax refunds, wages already paid, and depreciation expenses. Additionally, counsel states that a "one-time, short term loan" to shareholders of \$335,500 was made in 2001 that would not have been if additional cash were required to pay salaries. Finally, counsel also states that salaries were increased in 2002 of two shareholders that amounted to \$43,700. The petitioner submits a declaration signed by [REDACTED] treasurer and chief financial officer for the petitioner. The [REDACTED] states that the petitioner paid \$1 million in wages in 2001² despite its reported loss and corroborates counsel's statement concerning the loan to shareholders for that year. The Melkonian Declaration also provided information concerning the loan to shareholders as follows:

The total loan amount of \$335,000 was short-term and all due and payable by the shareholders to the [petitioner] within twelve (12) months. The [petitioner] was able to make the loan because it did not immediately need the cash that it had on-hand and cash that was otherwise available from bank lines of credit. The loans were made in order to permit the shareholders to take advantage of a business opportunity. Had the [petitioner] required the money to pay salaries or other expenses the loan would not have been authorized and could have been re-paid on demand. In fact the loans were repaid was evidence [sic] by the [petitioner]'s 2002 tax return.

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

² Line 3 of the petitioner's tax return, "Cost of Labor," on Schedule A corroborates this assertion.

The [REDACTED] also discusses depreciation and general wage expenses in 2001 and 2002 and states that the two shareholders received compensation increases of \$43,700.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did establish that it employed and paid the beneficiary wages in each respective year, 2000, 2001, and 2002 of \$13,354.72, \$27,276.89, and \$22,094.36, respectively. Thus, the petitioner must demonstrate that it can pay remaining wages each year, 2000, 2001, and 2002 of \$25,645.28, \$11,723.11, and \$16,905.64, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income of \$29,054, -\$124,741, and -\$14,195 in 2000, 2001, and 2002, respectively, are all less than the proffered wage of \$39,000 and do not prove the petitioner's continuing ability to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid

are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 2000 were \$178,799, which is greater than the proffered wage of \$39,000. Thus, the petitioner has demonstrated its ability to pay the proffered wage out of its net current assets in 2000. The petitioner's net current assets during 2001 and 2002, however, were negative. Thus, the petitioner has not demonstrated its ability to pay the proffered wage out of its net current assets in 2001 or 2002.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows a net income of only \$29,054, but net current assets of \$178,799 and has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a loss of -\$124,741 and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002. In 2002, the petitioner shows a loss of -\$14,195 and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

In 2001 and 2002, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel and the petitioner make plausible arguments concerning its financial situation in 2001, namely the loan made to shareholders to expand the petitioner's business. However, no evidence was submitted to corroborate that assertion, such as a business plan, or evidence as to how the money was spent and that it actually did increase the petitioner's revenues or financial standing. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, the loan was reported on the petitioner's tax return on Line 7 of Schedule L, which makes it a regular asset and not a current asset⁴. Thus, like wage and depreciation expenses, it cannot be added back now. Counsel and the petitioner's final argument that the petitioner raised the salaries of two shareholders likewise cannot alter the analysis in this case. The petitioner chose to pay greater salaries despite reported losses on its taxes. The AAO is loath to find that paying greater salaries to two shareholders somehow improves the petitioner's financial standing and is evidence of its ability to pay an additional salary when its taxes show negative net income and negative net current assets.

The petitioner submitted evidence sufficient to demonstrate its ability to pay the proffered wage during 2000. However, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ Thus, it was not an obligation payable within one year, regardless of whether or not it actually was paid back within one year. As noted above within this decision, CIS and the AAO does not consider assets that are not current.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.